

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-02/09-102
)
 Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Office of Vermont Health Access (OVHA) denying Medicaid payment for home health care services during a period in which the petitioner was temporarily out of state.

Procedural History

N.R. requested a fair hearing on behalf of petitioner on February 11, 2009 after being orally told that the petitioner's home health care would not be covered while she was temporarily out of state. N.R. was told that Vermont Medicaid does not pay out of state home health care providers.

The fair hearing commenced on March 12, 2009. The parties were informed that the hearing would be continued so that sufficient time could be set aside for testimony. The hearing officer identified equitable estoppel as an issue raised in N.R.'s testimony that he had relied upon information he received from Maximus personnel starting on

November 21, 2008 to arrange Vermont Medicaid coverage for petitioner's home health care while she was temporarily out of state. OVHA was asked to make available for hearing the Maximus personnel that N.R. identified.

The hearing continued on March 23, 2009. OVHA had not arranged for the testimony from the Maximus staff N.R. identified he contacted in November 2008 through January 2009. A recess was given to allow OVHA to arrange testimony. OVHA's counsel represented that his understanding was that the Maximus employee who first dealt with N.R. did not recall the telephone conversations with N.R. Testimony was taken from a Maximus supervisor setting out their procedures.

OVHA was asked to supply references to the particular regulations dealing with out of state Medicaid coverage and given an opportunity to submit additional affidavits prior to a telephone status conference scheduled for March 30, 2009. OVHA did not supply this information by the telephone status conference, but did so on April 3, 2009. These subsequent materials will be discussed below.

FINDINGS OF FACT

1. Petitioner is an eighty-four-year-old woman who is eligible for both Medicare and Medicaid. Petitioner is a Vermont resident. Petitioner does not speak English; her children handle her affairs with Medicare and Medicaid. Petitioner's son, N.R., testified on behalf of petitioner; he has authority to deal with OVHA regarding his mother's Medicaid issues.

2. Petitioner's treating physician, Dr. B, is located in Rutland, Vermont. N.R. had not been asked by OVHA for a copy of petitioner's plan of care. At hearing on March 12, 2009, N.R. was requested to bring a copy of Dr. B's plan to ascertain the scope of home health services ordered. N.R. supplied Dr. B's Home Health Certification and Plan of Care dated October 15, 2008 that included a Homecare aide for personal care two times per week.

Petitioner is unsteady on her feet and needs personal assistance getting into and out of the bathtub twice per week. Petitioner also receives Physical Therapy, Occupational Therapy, and skilled nursing services; Medicare is the primary payer for these services.

3. On or about November 1, 2008, petitioner went to her daughter's home in South Carolina for the winter.

Petitioner winters with her daughter. When petitioner is in South Carolina, she receives medical services from Dr. A and his associates. According to N.R., Dr. B and Dr. A work together and Dr. A has continued petitioner's plan of care in a Certification and Plan of Care subsequent to Dr. B's plan referenced above. Medicare is paying for these services except for the home health services. N.R. testified that the petitioner's medical condition worsened a couple of years ago leading to the need for home health services. This is the first year they have asked for home health coverage while petitioner is in South Carolina.

4. N.R. first called the 800 number for Medicaid member services on November 21, 2008. The 800 number connects to Maximus; OVHA contracts with Maximus to handle telephone calls by consumers or their representatives regarding the Vermont medical programs administered by OVHA. N.R. explained that he was only given the first name of the person handling the call, and, that despite his requests to continue with the first person he spoke to, his subsequent calls were handled by whoever answered the call.

5. N.R. spoke with Tim on November 21, 2008. N.R. telephoned because he wanted to know whether his mother's Medicaid would cover the cost of home health care while his

mother was in South Carolina. N.R. wanted to know whether to continue with Vermont Medicaid over the winter or whether he should see if South Carolina would cover expenses during the winter. He did not want to create the possibility of either double coverage or a lapse in coverage for petitioner.

N.R. understood Tim to explain that the petitioner would be covered by Vermont Medicaid while she traveled or was temporarily out of state. N.R. testified that Tim told him to find a medical provider approved by Vermont Medicaid and that Tim directed him to a state website listing out of state providers approved by Vermont Medicaid.

6. N.R. checked the website and found one South Carolina home health agency listed as a Vermont Medicaid provider. N.R.'s sister checked out this information and found that the listed South Carolina provider was not feasible due to its location in another part of South Carolina.

7. N.R. called Maximus on November 25, 2008 and spoke to Kathy. N.R. testified that he was told to find a provider in South Carolina willing to register as a Vermont provider. N.R. was referred to Ashley and he left a message for her. Ashley spoke to N.R. on November 26, 2008. N.R. testified that Ashley told him that his mother is eligible for home

health care due to her medical condition and explained the process for finding a provider.

8. N.R.'s sister found Right at Home, a home health care agency approved for South Carolina Medicaid. Right at Home was willing to register as a Vermont Medicaid provider. Right at Home started services on January 19, 2009. They provided a home health aide two times per week to assist with bathing. They charge \$30 per visit.

9. J.F. does the billing for Right at Home. N.R. testified that he was contacted by J.F. on January 30, 2009 that Margaret at Vermont Provider Services told J.F. that Vermont Medicaid does not approve out-of-state providers. N.R. tried to verify this information by calling Margaret that day but was told she could not speak to him since he was not a provider.

N.R. submitted a written statement by J.F. documenting her attempts to have Right at Home qualify as a Vermont Medicaid provider; the pertinent parts of J.F.'s letter state:

In a subsequent conversation with Margaret, Margaret said she was not familiar with Vermont ever paying an out of state provider for services for a Vermont resident who was out of state when receiving the services.

The next conversation with Margaret (7-10 days later)- Margaret said Vermont would not approve a out of state provider.

10. N.R. telephoned Maximus on January 30, 2009 and spoke to Tim. N.R. testified that Tim told him that there must be a communication problem and that he would do an Outreach Provider Request. When N.R. found that nothing had changed, he called Maximus on February 11, 2009 and spoke to Sarah who stated she would do an Outreach Provider Request. At that point, N.R. sought a supervisor. N.R. filed his request for fair hearing on February 11, 2009.

11. A M108 Request was filed on or about February 23, 2009 by petitioner asking for the same type of home health services she received in Vermont for bathing. Petitioner explained that she attempted bathing on her own but fell in the tub. OVHA denied her M108 request on March 4, 2009 because her request was for a Medicaid covered service.

12. N.R.'s testimony as to his understanding of the information he received from Maximus and OVHA is credible. His actions are consistent with his understanding of the program requirements to find an out-of-state provider who would contract with Vermont Medicaid.

13. J.F. is a project director for Maximus and supervises the Maximus employees to whom N.R. spoke. She

testified on March 23, 2009. She explained the process Maximus follows with each telephone call. The representative will look up the individual's record; this allows him/her to see if there are prior telephone calls. Maximus records the name of the person calling, the name of the recipient, the program, telephone topic and resolution. The information is brief. Notes are not taken. The following notation is from petitioner's case log and representative of notations for other telephone contacts:

Helpline call: 11/21/2008 3:11 p.m. Staff...
HOH SSN...Caller Name [N.R.]
Call Topic O?-MC Benefits/Provider Resolution:K Refer to
Provider

The representative pulls up a covered service list from the computer to give general information. They are instructed to advise callers "that providers should confirm coverage with EDS". The following information is from the screen for home health care:

Upon doctor certification/referral. Must use Medicaid providers.
Only PT/OT/ST requires PA after 4 months. Nursing Home Health Aid visits do not require PA.

J.F. explained that "outreach provider request" is looking at whether EDS and the provider can work out a billing agreement.

14. A Maximus representative may handle up to 100 telephone calls during a day.

15. On April 3, 2009, OVHA submitted four affidavits. The only personalized affidavit was from R.S. who noted that she informed N.R. on February 11, 2009 that home health services are not covered out of state.

The other three affidavits were from T.B. (Tim), J.C., and S.M. The affidavits do not include the date(s) each person had contact with N.R. nor specific information regarding the particular contact. The affidavits are identical and give generalized information. The affidavits do not rebut N.R.'s testimony that he was directed to a website for out of state providers, that he was told to find a South Carolina provider to contract with Vermont Medicaid. In light of the cursory information kept by Maximus, the high volume of telephone calls fielded by each representative, the affidavits are not convincing.

16. N.R. testified that if had understood that Vermont Medicaid would not cover his mother's home health care while she was out of state, he would not have spent the time and effort to put coverage in place through Vermont Medicaid but would have applied for South Carolina Medicaid instead to

cover his mother during her winter stay in their state. Petitioner has made payments for services from Right at Home.

ORDER

OVHA's decision to deny Medicaid coverage for petitioner while she was temporarily out of state is reversed.

REASONS

Petitioner is an elderly Vermont resident who receives Medicaid and Medicare. Her children are attentive to her needs and ensure that she escapes Vermont winter weather by staying with a daughter in South Carolina. Petitioner's health has deteriorated such that she now needs assistance with bathing. Such services are within the purview of home health care and are covered expenses under the Medicaid program. M710.

The regulations governing home health care do not preclude Medicaid coverage when a person is out of state. M710. In fact, N.R. was referred to a Vermont website that lists out of state providers and included a home health agency from South Carolina. Additionally, N.R. first received information from Maximus about seeking a home health agency from South Carolina that would agree to contract with Vermont. This testimony is not contested. Later statements

made to N.R. and Right at Home that Vermont Medicaid does not cover out of state home health providers were erroneous.

Congress created the Medicaid program to:

Furnish (1) medical assistance on behalf of...aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help...individuals attain or retain capability for independence of self care...

42 U.S.C. § 1396

To that end, OVHA and its designees have an affirmative obligation to inform applicants and all other individuals who request information of eligibility requirements, available services, and rights and responsibilities of both applicants and recipients. 42 C.F.R. § 435.905.

Petitioner has incurred costs for home health care from Right at Home. N.R. has expended time and effort following through on what he thought he needed to do to have the petitioner's home health needs covered while she was in South Carolina. N.R. is arguing that they detrimentally relied upon OVHA and its designees and that OVHA should be equitably estopped from denying Medicaid coverage.

This case has a confused history, in part, due to the lack of clarity in the information N.R. received and, in part, due to the erroneous information N.R. received in

February from OVHA and its designees that they could not cover petitioner's home health services out of state under the Medicaid program. It should be noted that this decision was made orally rather than in writing.¹ On petitioner's behalf, N.R. requested a fair hearing on February 12, 2009.

The Board has the authority to apply equitable estoppel in cases. See Stevens v. Dept. of Social Welfare, 159 Vt. 408 (1992). The Court laid out the elements of equitable estoppel on page 421 of the Stevens case as:

- (1) the party to be estopped must know the facts;
 - (2) the party to be estopped must intend that its conduct shall be acted upon or the acts must be such that the party asserting the estoppel has a right to believe it is so intended;
 - (3) the party asserting estoppel must be ignorant of the true facts; and
 - (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped.
- Starting November 21, 2008, N.R. informed Maximus that

he was seeking Medicaid home health coverage for the petitioner while she wintered in South Carolina. Maximus was aware that the petitioner needed home health coverage, was in South Carolina temporarily for the winter, and wanted Vermont

¹ Petitioner later applied for M108 coverage and received a written denial of M108 coverage for home health services because home health services are covered under Medicaid. The M108 denial is in accord with pertinent regulations.

Medicaid to cover this service. Maximus knew that N.R. was acting on petitioner's behalf. His repeated calls to Maximus put them on notice that he was following through on petitioner's request. The first element of equitable estoppel is met.

N.R.'s testimony that he was led to believe that if he followed the information from Maximus that the petitioner would be covered for Home Health services by Vermont during her stay in South Carolina is credible. Part of Maximus' role is to give information with the understanding that this information will be acted upon by the callers. In their role, they are acting as OVHA's agent and subject to the Medicaid requirements that a person requesting information be given information regarding eligibility, services, and rights and responsibilities. The second element of equitable estoppel is met.

N.R., acting on behalf of petitioner, was ignorant of the true facts (third element of equitable estoppel) in this case.

The fourth element of detrimental reliance is met. N.R. acted on Maximus' information. His family put in place home health services for petitioner while she visited her daughter. They had the South Carolina home health agency

contact Vermont to enroll as a Vermont Medicaid provider. They did not contact South Carolina and apply to enroll petitioner there during her South Carolina stay. The petitioner was billed by Right at Home and has paid for her care from her funds.

Based on the above, OVHA's decision is reversed and the petitioner should be granted Medicaid benefits for her home health services starting January 19, 2009. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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